

JAN 8 1988

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT
OPERATING AGENCY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION, et al.,

Respondents.

On a Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

RESPONDENT PUBLIC UTILITY COMMISSION
OF OREGON'S BRIEF IN OPPOSITION TO
ISSUANCE OF WRIT OF CERTIORARI

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
W. BENNY WON
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit en banc correctly refused to give *res judicata* effect to a prior Federal Energy Regulatory Commission ("FERC" or "Commission") decision¹ on a "purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case."²

2. Whether the Court of Appeals en banc was correct in holding that the municipal preference clause in section 7(a) of the Federal Power Act ("Act"), 16 U.S.C. § 800(a) (1982), does not apply in a relicensing proceeding in which the original licensee of the project is one of the applicants.

3. Whether FERC, in determining the "public interest" under section 7(a) of the Act, 16 U.S.C. § 800(a) (1982), for purposes of issuing a federal license to operate a hydroelectric power project in a relicensing proceeding in which the original licensee of the project is one of the applicants, may take into account the relative economic impacts and consequences of granting the license to one or the other of the competing applicants.

¹ *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) § 61,337 (1980) ("*Bountiful*").

² *City of Bountiful, Utah*, Docket No. EL 78-43 (FERC May 3, 1979) (unpublished) (order granting interventions and setting briefing schedule), quoted verbatim in the Petition for Writ of Certiorari at 6.

PARTIES TO THE PROCEEDINGS BELOW

Respondent Public Utility Commission of the State of Oregon (Oregon) intervened in the proceedings before the Federal Energy Regulatory Commission and the United States Court of Appeals for the District of Columbia, to represent and protect the interests of the state's residents, businesses and industries. See Or. Rev. Stat. § 756.040. Pacific Power and Light Company (PP&L), which is the owner and incumbent licensee of the Merwin Hydroelectric Project and one of the two competing applicants for the new license for the Project, serves 400,000 customers in Oregon, including 76,000 commercial and industrial customers. The Merwin Project was paid for in large part by inclusion of depreciation charges and a return on investment in the customers' electricity rates. Thus, the Oregon citizens who are served by PP&L have a substantial interest in whether PP&L retains the Merwin Project as part of its power supply system because, if the utility loses its license to the project, the ratepayers will lose the benefits of the low-cost electricity produced by that plant.

A list of the parties in the Court of Appeals appears at page ii of the Petition for a Writ of Certiorari filed by the Clark-Cowlitz Joint Operating Agency.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	ii
Reasons for Denying the Writ	1
Conclusion	3

TABLE OF AUTHORITIES

	Page
Cases Cited	
Chapman v. Federal Power Comm'n, 345 U.S. 153 (1953)	2
City of Bountiful, Utah, 11 F.E.R.C. (CCH) § 61,337 (1980)	1,2
Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973)	2
Scenic Hudson Preservation Conf. v. Federal Power Com'n, 354 F.2d 608, 615 (2d Cir. 1965), <i>cert.</i> <i>denied</i> , 384 U.S. 941 (1966)	2
Udall v. FPC, 387 U.S. 428 (1967)	2
Statutory Provisions	
Pub. L. No. 99-495, 100 Stat. 1243 (1986)	2
16 U.S.C. § 791a <i>et seq.</i> (1982)	1
16 U.S.C. § 800(a) (1982)	1

REASONS FOR DENYING THE WRIT

The Clark-Cowlitz Joint Operating Agency (CCJOA), in its petition for a writ of certiorari, presents three claims:

(1) that the United States Court of Appeals for the District of Columbia Circuit en banc opinion erroneously failed to give *res judicata* effect to FERC's interpretation of provisions of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* (1982), in *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) § 61,337 (1980) ("*Bountiful*");

(2) that the Court of Appeals en banc erroneously held that the municipal preference clause in section 7(a) of the Act, 16 U.S.C. § 800(a) (1982), did not apply in a relicensing proceeding in which one of the applicants is the original licensee of the project; and

(3) that FERC, in determining the "public interest" in a relicensing proceeding under section 7(a) of the Act, 16 U.S.C. § 800(a), may not take into account the relative economic impacts and consequences of a licensing decision on each of the competing applicants and on the respective segments of the public served by each of the applicants.

None of CCJOA's claims merits a grant of certiorari. Respondent Pacific Power and Light Company (PP&L) has filed arguments in opposition to CCJOA's petition for a writ of certiorari. Oregon joins in the substantive points advanced by PP&L. As PP&L argues, CCJOA's first and third claims are inconsistent. That is, CCJOA first contends that FERC's interpretation in *Bountiful* of the municipal preference clause (16 U.S.C. § 800(a)) should have been given preclusive effect. However, notwithstanding this contention of *res judicata* effect for *Bountiful*, CCJOA's third claim asks this Court to ignore FERC's holding in *Bountiful* that relative economic impacts should be considered in hydro-

electric project relicensing proceedings.³ CCJOA cannot have it both ways.

Furthermore, the municipal preference question raised in CCJOA's second claim of error was addressed by Congress in the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). This legislation clarified the matter by prohibiting a municipal preference in relicensing proceedings.⁴ Passage of this legislation has greatly reduced the significance of this issue.

CCJOA's petition for a writ of certiorari presents no issue of importance beyond the resolution of this case. This case does not present the kind of special and important legal questions that merit a grant of certiorari. The Court of Appeals' en banc opinion does not conflict with decisions of this Court or of other circuits. Moreover, CCJOA's claims are inconsistent and without merit.

CONCLUSION

For the foregoing reasons, the Clark-Cowlitz Joint Operat-

³ The pertinent portion of *Bountiful* is reprinted in Appendix to the Petition for Writ of Certiorari, at 389a-92a. Additional support for FERC's determination in *Bountiful* that economic impacts can be considered as a factor bearing on the public interest is found in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 756-58 (1973); *Udall v. FPC*, 387 U.S. 428, 448-50 (1967); *Chapman v. Federal Power Comm'n*, 345 U.S. 153, 171 (1953) (commission has broad discretion to consider, *inter alia*, "economic issues" in licensing proceedings); *Scenic Hudson Preservation Conf. v. Federal Power Com'n*, 354 F.2d 608, 615, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (commission "has an affirmative duty to inquire into and consider all relevant facts," including economic interests).

⁴ As CCJOA noted in its Petition for a Writ of Certiorari, at 13, this legislation "provided that the [present case] continues to be governed by the existing statute. Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 2, 11, 100 Stat. 1243, 1245 (1986)."

ing Agency's petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVE FROHNMAYER

Attorney General of Oregon

WILLIAM F. GARY

Deputy Attorney General

VIRGINIA L. LINDER

Solicitor General

W. BENNY WON

Assistant Attorney General

Counsel for Respondent

Public Utility Commission
of the State of Oregon